

11-4-2015

# Shatto v. Syringa Surgical Center, LLC Appellant's Brief Dckt. 42958

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/  
idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Shatto v. Syringa Surgical Center, LLC Appellant's Brief Dckt. 42958" (2015). *Idaho Supreme Court Records & Briefs*. 5970.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/5970](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/5970)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**BEATRICE L. SHATTO, as Personal )  
Representative of the ESTATE OF )  
HARVEY A. WAINIO, and BEATRICE )  
SHATTO, individually, JENNIFER LYNN )  
VIVEROS, individually, )**

**DOCKET NO. 42958-2015**

**Plaintiffs/Appellants, )  
vs. )**

**Nez Perce County Case No. CV-2011-517**

**SYRINGA SURGICAL CENTER, LLC )  
d/b/a SYRINGA MEDICAL CENTER, )  
RICHARD M. ALLEN, D.P.M., )  
individually and as an employee and/or )  
agent of SYRINGA SURGICAL CENTER )  
LLC, d/b/a SYRINGA MEDICAL )  
CENTER, an Idaho Corporation, )**

**APPELLANTS' OPENING BRIEF**

**Defendants/Respondents. )**

**APPELLANT'S OPENING BRIEF**

Appeal from the District Court of the Second Judicial District for Nez Perce

Honorable Jeff M. Brudie, District Judge presiding

Leander L. James, ISB #: 4800  
Melanie E. Baillie, ISB # 7232  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Telephone: (208) 667-0683  
Facsimile: (208) 664-1684  
E-Mail: [ljames@jvwlaw.net](mailto:ljames@jvwlaw.net)  
[mbaillie@jvwlaw.net](mailto:mbaillie@jvwlaw.net)

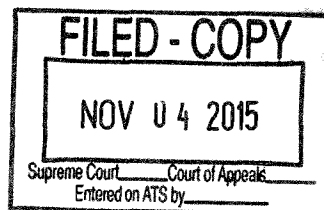
Mark D. Kamitomo, ISB # 8094  
Collin M. Harper  
THE MARKAM GROUP, INC., P.S.  
421 W. Riverside, Suite 1060  
Spokane, Washington 99201  
Telephone: (509) 747-0902  
Facsimile: (509) 747-1993  
E-Mail: [mark@markamgrp.com](mailto:mark@markamgrp.com)  
*Attorneys for Plaintiffs and Appellant, Beatrice  
L. Shatto*

Markus W. Louvier  
Evans, Craven & Lackie, P.S.  
818 W. Riverside, Suite 250  
Spokane, WA 99201-0910

*Attorney for Syringa Surgical Center, LLC*

J. Kevin West  
Parsons, Behle & Latimer  
800 W. Main Street, Suite 1300  
Boise, Idaho 83702

*Attorney for Richard M. Allen, D.P.M.*



## I. TABLE OF CONTENTS

	Page
II. TABLE OF CASES AND AUTHORITIES.....	iii
III. STATEMENT OF THE CASE .....	1
A. Nature of the Case .....	1
B. Course of Proceedings Below .....	3
C. Statement of the Facts .....	6
D. Standard of Review on Appeal .....	12
IV. ISSUES PRESENTED ON APPEAL .....	13
V. ARGUMENT .....	14
A. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO SYRINGA SURGICAL CENTER, LLC.....	14
1. The District Court Erred By Finding That Appellants Asserted No Negligent Conduct By Dr. Allen At The Time He Performed Mr. Wainio’s Surgery At Syringa Surgical center.....	15
a. Appellants Have Asserted Facts Showing Dr. Allen’s Negligence in Conducting the Surgery in the First Instance.....	16
b. There is a Material Issue of Fact Whether Allen was an Actual or Apparent Agent of Syringa at the Time of the Surgery.....	18
2. The District Court Erred By Finding That Dr. Allen Was Not An Actual Or Apparent Agent Of The Respondent At The Time That Dr. Allen Negligently Evaluated Harvey Wainio Pre-Surgically.....	21
3. The District Court Erred By Finding Syringa Bore No Independent Liability Arising From Evidence Of Its Complicity With Dr. Allen’s Drug Abuse.....	27

B.	THE DISTRICT COURT ERRED BY STRIKING THE EVIDENCE OF APPELLANTS' EXPERT, DR. WISCHMEYER, REGARDING DR. ALLEN'S DRUG USE.....	29
1.	The District Court Erred In Creating A New Evidentiary Standard For The Admissibility Of Expert Testimony Contrary To The Standard Set Forth By This Court In <u>Nield V. Pocatello</u> <u>Health Servs., Inc.</u> , 156 Idaho 802, 332 P.3d 714 (2014).....	29
2.	The District Court Erred In Creating A New Evidentiary Standard To Measure The Probative Value Of Expert Testimony Against The Potential Prejudice Of Such Evidence .....	37
3.	The District Court's New Standard For The Admissibility Of Expert Testimony Violated The Appellants' Constitutional Right To A Trial By Jury By Summarily Weighing The Factual Evidence Reserved For The Trier Of Fact.....	40
VI.	CONCLUSION.....	42

## II. TABLE OF CASES AND AUTHORITIES

### Cases:

<u>Adkison Corp. v. American Bldg. Co.</u> , 107 Idaho 406, 690 P.2d 341 (1984).....	18
<u>American West Enterprises, Inc. v. CNH, LLC</u> , 155 Idaho 746, 316 P.3d 662 (2013) .....	18
<u>Bailey v. Ness</u> , 109 Idaho 495, 708 P.2d 900 (1985) .....	18
<u>Brown v. City of Pocatello</u> , 148 Idaho 802, 229 P.2d 1164 (2010).....	17
<u>Caballero v. Wikse</u> , 140 Idaho 329, 92 P.3d 1076 (2004).....	18, 19
<u>City of McCall v. Seubert</u> , 142 Idaho 580, 130 P.3d 1118 (2006) .....	41
<u>Clark v. Gneiting</u> , 95 Idaho 10, 501 P.2d 278 (1972).....	18
<u>Coombs v. Curnow</u> , 148 Idaho 129, 219 P.3d 453 (2009) .....	30, 41
<u>Cox v. North-Western Stage Co.</u> , 1 Idaho 376 (Id. Terr., 1871) .....	40
<u>Garret v. Taylor</u> , 69 Idaho 487, 210 P.2d 386 (1949).....	41
<u>Gem State Ins. Co. v. Hutchison</u> , 145 Idaho 10, 175 P.3d 172 (2007).....	13
<u>Herbst v. Both of Daires, Inc.</u> , 110 Idaho 971, 719 P.2d 1231 (Ct. App. 1986).....	18
<u>Jones v. Healthsouth Treasure Valley Hospital</u> , 147 Idaho 109, 206 P.3d 473 (2009).....	22, 23, 24, 26
<u>Kirkland v. Blaine County Medical Center</u> , 134 Idaho 464, 4 P.3d 1115 (2000) .....	36
<u>Miller v. Haller</u> , 129 Idaho 345, 924 P. 2d 607 (1996).....	13, 41
<u>Nield v. Pocatello Health Servs., Inc.</u> , 156 Idaho 802, 332 P. 3d 714 (2014).....	1, 14, 29, 30, 31, 32, 33, 34, 35, 36

<u>Obendorf v. Terra Hug Spray Co. Inc.</u> , 145 Idaho 892, 188 P. 3d 834 (2008).....	38
<u>Purvis v. Progressive Cas. Ins. Co.</u> , 142 Idaho 213, 127 P.3d 116 (2005) .....	12
<u>Reinhold v. Spencer</u> , 53 Idaho 688, 26 P.2d 796 (1933) .....	41
<u>Sharp v. W.H. Moore, Inc.</u> , 118 Idaho 297, 796 P. 2d 506 (1990).....	18
<u>State v. Bennion</u> , 112 Idaho 32, 730 P.2d 952 (1986) .....	40
<u>State v. Faught</u> , 127 Idaho 873, 908 P.2d 566 (1995) .....	30
<u>State v. Floyd</u> , 125 Idaho 651, 873 P.2d 905 (1994) .....	37
<u>State v. Gauna</u> , 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989) .....	37, 38
<u>Swallow v. Emergency Med. of Idaho, P.A.</u> , 138 Idaho 589, 67 P.3d 68 (2003) .....	30
<u>Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.</u> ,	
119 Idaho 87, 803 P.2d 993 (1991).....	13
<u>Thomson v. City of Lewiston</u> , 137 Idaho 473, 150 P.3d, 488 (2002) .....	12
<u>Tusch Enterprises v. Coffin</u> , 113 Idaho 37, 740 P.2d 1022 (1987) .....	12
<u>United States v. Candoli</u> , 870 F. 2d 496 (9th Cir. 1989) .....	38
<u>United States v. Evans</u> , 728, F.3d 953 (9th Cir. 2013) .....	38
<u>United States v. Mende</u> , 43 F.3d 1298 (9th Cir. 1995).....	38
<u>United States v. Reyes</u> , 660 F.3d 454 (9th Cir. 2011) .....	38
<u>United States v. Sandoval-Mendoza</u> , 472 F.3d 645 (9th Cir. 2006).....	30, 31
<u>Wade v. Haynes</u> , 663 F.2d 778 (8th Cir. 1981) .....	37

**Statutes:**

Idaho Code § 30-6-407(2).....	19
Idaho Code § 54-608(2) .....	10

**Rules:**

Idaho Rule of Civil Procedure 56(c) .....	12
Idaho Rule of Evidence 403.....	37, 38, 39
Idaho Rule of Evidence 702 .....	29, 30

**Secondary Authorities:**

22 C. Wright & K. Graham, Federal Practice & Procedure: Evidence, § 5214 (1978).....	38
Restatement (Second) of Agency § 1 (1958).....	18
Restatement (Second) of Agency § 251 (1958) .....	18
Restatement (Third) of Agency § 7.05 (2006).....	18

### **III. STATEMENT OF THE CASE**

#### **A. Nature of The Case**

This appeal arises from two rulings by the district court. First, the district court granted summary judgment for the Respondent, Syringa Surgical Center, LLC, holding that it cannot be held vicariously liable for Dr. Allen's negligence. In its ruling, the district court erred when it found that the Appellants did not allege that Dr. Allen acted negligently on the day of or during the surgical procedure. The district court further found that no facts existed supporting a principal/agent relationship between Dr. Allen and the Respondent. According to the district court, at the time of the alleged negligence, Dr. Allen was not acting as a staff member or an owner of the Respondent, saying these were the only two contexts in which Respondent could be found vicariously liable.

Second, the district court ruled that the testimony of Appellants' expert witness, Dr. Paul E. Wischmeyer ("Dr. Wischmeyer"), was inadmissible because it lacked adequate foundation and was more prejudicial than probative. In so ruling, the district court disregarded the standard for evaluating expert testimony established by this Court in Nield v. Pocatello Health Servs., Inc., 156 Idaho 802, 332 P.3d 714 (2014). The district court impermissibly weighed the evidence relied upon by Dr. Wischmeyer, and concluded that his testimony lacked factual foundation.

In its findings, the district court ignored material facts related to Dr. Allen's drug abuse and relapse. The district court further assigned undue credibility to the defense witnesses'



testimony with established biases in favor of the Respondent and Dr. Allen. The district court also weighed and reconciled contradictions in deposition testimony in the Respondent's and Dr. Allen's favor regarding Dr. Allen's drug use and the witnesses' knowledge thereof.

The above rulings by the district court demonstrate a disregard for the role of the fact finder in determining the credibility of evidence and the limited role of the court to act as a gatekeeper. This disregard extends to the court's ruling concerning the complicity of the Respondent in Dr. Allen's alleged negligence involving illicit drug abuse and in conducting the surgery in the first instance.

Dr. Allen performed the surgical procedure at the Respondent Surgical Center. Dr. Allen is a one-third owner of the Respondent. As a result of the Dr. Allen's negligence by conducting the surgery, Harvey Wainio lost his leg to amputation because Dr. Allen conducted surgery on it, and he eventually died.

The evidence in front of the district court demonstrated that the other owners of the Respondent Surgical Center were aware of Dr. Allen's drug abuse for a significant period of time before the surgical procedure at issue took place. Notwithstanding, they allowed Dr. Allen to continue to surgically treat patients in the Respondent facility and did not take steps to confront Dr. Allen on his drug abuse until after he a contract pharmacist for the facility discovered and reported Dr. Allen. Furthermore, even after the report of Dr. Allen's Propofol abuse (for which he was disciplined), neither the Respondent nor Dr. Allen reported Dr. Allen's 10 year history of opiate abuse of some 45 tablets per day to state officials.

**B. Course of Proceedings Below**

The procedural history regarding admission of Dr. Wischmeyer's testimony, and evidence of Defendant's drug abuse, began early in this litigation and was the subject of several motions and discovery issues.

Neither Dr. Allen nor Respondent disclosed Dr. Allen's drug addiction, or their knowledge of the same in discovery until after Appellants uncovered it through independent investigation and moved to compel a second deposition of Dr. Allen. At that point, Appellants engaged an expert, Dr. Wischmeyer, to evaluate the effect, if any, of Dr. Allen's drug use on his negligent treatment of Mr. Wainio. Thereafter, Respondent and Dr. Allen continued to obstruct access to, and prevent admissibility of, Dr. Allen's illicit drug use. R. p. 411.

On June 21, 2012, the district court heard argument on Dr. Allen's and the Respondent's motion seeking a protective order preventing the discovery of any information related to Dr. Allen's drug use. The district court denied the motion on the grounds that Appellants sought discovery of information reasonably calculated to lead to the discovery of admissible evidence. R. p. 328-331.

Respondent and Dr. Allen continued to obstruct the discovery of information related to Dr. Allen's drug use. Each of the discovery matters resisted by the Respondent and Dr. Allen resulted in the discovery of relevant evidence. The evidence discovered supported Dr. Wischmeyer's testimony that Dr. Allen was under the influence of drugs at the time of the alleged negligence.

On January 10, 2013, the district court heard argument on Appellants' motion to compel the depositions of Respondent's employees and Dr. Allen related to the discovery of Dr. Allen's drug use. The district court compelled the depositions by written order entered on January 28, 2013. R. p. 516-17.

Appellants were forced to bring another discovery motion to compel the production of Dr. Allen's dental records and the deposition of his dentist, Dr. Bengston. At the same hearing, the district court heard argument on Dr. Allen's motion to quash Appellants' subpoena *duces tecum* to K-Mart pharmacy seeking Dr. Allen's prescription records. Once again, the district court permitted the requested discovery, including production of the pharmacy records, by written order on November 27, 2013. R. p. 1198-1202.

The district court heard argument on the Respondent's and Dr. Allen's motion *in limine* on February 13, 2014, to prevent admission of any evidence of Dr. Allen's drug use, as well as argument on another motion by Appellants to compel depositions. The district court again compelled the depositions. R. p. 2254-59. The district court issued a written ruling on February 19, 2014, granting the Respondent's and Dr. Allen's motion *in limine* precluding evidence of Dr. Allen's drug abuse. *Id.* Importantly, at the same time the district court considered the motion *in limine*, it also considered the Respondent's and Dr. Allen's motions to strike the Affidavits of Bea Shatto and Paul E. Wischmeyer, both of which were in support of Appellants' opposition to the motion *in limine* and both of which supported an inference that Dr. Allen had relapsed at the time of Mr. Wainio's surgery. The district court denied the motions to strike the Affidavits. *Id.*

After the Court granted the Respondent's and Dr. Allen's motion *in limine* precluding the admission of evidence of Dr. Allen's drug use at trial, the Respondent and Dr. Allen moved the district court to prevent any further discovery of evidence related to Dr. Allen's drug use. At the same time, Appellants moved to compel the depositions of Renee Corder, and Dr. Ozeran, one of the members of the Respondent LLC, both of which had previously been compelled to occur by the district court. The district court denied the Respondent's and Dr. Allen's motion and once again compelled the depositions. Id.

After the district court granted the Respondent's and Dr. Allen's motion *in limine*, Appellants moved the district court for permission to appeal. The district court denied the motion on February 25, 2014. R. pp. 2428-2431.

After conducting additional discovery permitted by the district court Appellants filed a motion *in limine* seeking an order allowing the evidence of Dr. Allen's drug use. R. pp. 3030-3035. On November 6, 2014, the district court denied Appellants' motion *in limine* and again ruled Dr. Wischmeyer's testimony inadmissible. Id. Appellants also moved the district court for permission to appeal the court's ruling on their motion *in limine*, which was also heard on November 6, 2014. Id. The district court denied Appellants' motion for permission to appeal. Id.

In addition to the issue of Dr. Wischmeyer's testimony, the Respondent brought a motion for summary judgment seeking dismissal on the grounds that there was no question fact regarding the agent-principal relationship between Dr. Allen and the Respondent. R. pp. 3037-3041. The Court granted the Respondent's motion for summary judgment by written ruling on November 26, 2014, dismissing the Respondent from the case. Id.

Thereafter the Appellants entered into a settlement agreement with Dr. Allen (R. pp. 3116-3119). As the district court had dismissed the Respondent on summary judgment, a final judgment against the only remaining party had been entered (R. pp. 3120-3121).

**C. Statement of Facts**

At all times relevant, Defendant Richard Allen was and is an Idaho licensed podiatrist practicing podiatry in Lewiston, Idaho (R. p. 1235), although Dr. Allen's license was on probation a three year period beginning in October, 2010. R. p. 1410. Dr. Allen was also an owner/member in Respondent Syringa Surgical Center, a limited liability company, with two other members: Dr. Steven Ozeran and Dr. Ronald Alm. R. p. 2855. The purpose of Respondent Syringa Surgical Center, LLC is to "own and operate a surgical center." R. p. 2857.

Harvey Wainio was first referred to Dr. Allen on January 4, 2010, by his primary care physician, Dr. Sigler. R. p. 3058. At the initial consultation, among other things, Dr. Allen allegedly evaluated Mr. Wainio's pedal pulses. R. p. 2003. Dr. Allen recommended surgery to correct issues Mr. Wainio had with his right foot. R. p. 3058. There is no evidence that Dr. Allen gave Mr. Wainio any other treatment options. R. p. 2904. Dr. Allen told Mr. Wainio he needed surgery, it was a piece of cake, and that he had done over a hundred of them. R. p. 2904.

Mr. Wainio again saw Dr. Allen again as part of his pre-operative course on January 18, 2010. R. p. 3058. Dr. Allen's pre-operative history and physical again described the presence of strong posterior tibial and dorsalis pedis pulses bilaterally. R. p. 2005. At that time, Mr. Wainio filled out a "patient information sheet" with the name "Syringa Surgery Center" at the top R. p. 2908; a "Patient's Rights and Responsibilities" document also with the name "Syringa Surgery

Center” at the top, R. p. 2910; and a “consent” form again, with the name “Syringa Surgery Center” at the top of the page. R. p. 2911. These documents were all signed by Mr. Wainio on January 18, 2010, in Dr. Allen’s office.

Dr. Allen’s office was in the same building as Syringa Surgery Center, at 1630 23<sup>rd</sup> Avenue in Lewiston, Idaho. R. p. 2855; R. p. 2903.

The “patient information sheet” signed on January 18 in Dr. Allen’s office indicated that Syringa Surgical Center would submit claims to Mr. Wainio’s insurance carrier and further, by signing the document, Mr. Wainio agreed to pay all charges made by Syringa Surgical Center. R. p. 2908. The “Patient’s Rights and Responsibilities” document also provided by Dr. Allen’s office at the January 18 appointment, set forth Mr. Wainio’s rights “while receiving care at Syringa Surgical Center.” R. p. 2910. The document also encouraged Mr. Wainio to contact the Director of the surgical center if he had any questions or concerns regarding services or rights as a patient within the Surgical Center and provided a phone number for Syringa Surgical Center. Id.

The “consent” form that Mr. Wainio reviewed and signed in Dr. Allen’s office contained the same language as the “patient information sheet” regarding claims to insurance carriers and Mr. Wainio’s responsibility to pay the Surgical Center invoices. R. p. 2911. Further, the consent form contained numerous consent provisions each naming the Surgical Center, rather than Dr. Allen, as the party with whom Wainio consented. Id.

On January 21, 2010, Defendant Richard Allen performed an elective surgery on Mr. Wainio’s right foot in Syringa Surgical Center. R. p. 3038. There were three procedures

comprised of a right modified McBride bunionectomy, first metatarsal osteotomy with screw fixation, and a second toe arthrodesis PIPJ. R. p. 2915; R. p. 212. Mr. Wainio signed a “Syringa Surgery Center Consent for Operation, Anesthesia or Other Procedure” on the day of surgery wherein the form stated: *“I am aware of my physicians’ ownership in the surgery center and am aware that I may have surgery or treatment performed at any other facility where my surgeon has privileges.”* R. p. 2915. The previous consents, signed in Dr. Allen’s office, did not have any disclosures about Dr. Allen’s ownership in Syringa. R. p. 2908-11.

Mr. Wainio was discharged with post-operative instructions that had both “Syringa Surgical Center” and Dr. Allen’s name at the top of the page. R. p. 2912. The post operative instructions rendered advice about when to call “your doctor / on call representative”. R. p. 2912.

On January 24, 2010, Mr. Wainio began displaying weakness, vomiting and bladder incontinence. R. p. 2416. Pursuant to a 911 call, Mr. Wainio was taken to Syringa General Hospital in Grangeville, for evaluation and stabilization. R. p. 2416. Mr. Wainio was subsequently transferred to St. Mary’s Hospital in Cottonwood, Idaho, for treatment of an ischemic right foot. R. p. 2416.

After being stabilized at St. Mary’s hospital, he was sent to Spokane on January 29, 2010. Physicians at Inland Vascular Institute conducted an emergency vascular consult. R. p. 2417. The damage to the right foot was significant enough that a right foot amputation was necessary. R. 883. Ultimately, Mr. Wainio died on July 9, 2012. R. p. 461.

Respondent is a member managed limited liability company. R. p. 2870. Each of the three members, including Dr. Allen, has an equal voice in the management of the LLC. R. p. 2860. The LLC maintains and oversees the surgical center, and authorizes certain physicians, including Dr. Allen, access to its premises, its medications (including drugs Dr. Allen abused) and its surgical facilities.

Respondent's operating agreement recognizes that each of the three members has a full time practice which utilizes the surgical center. Pursuant to the operating agreement, each member must maintain that full time practice as "*it is in the Company's best interests.*" R. p. 2864. A member who does not maintain his full time practice must sell his interest in Respondent to the other members. R. p. 2864.

Any professional desiring to utilize Respondent to conduct surgeries must seek and obtain the status of staff, and must abide by the medical staff bylaws and all rules and regulations put into place by the board. R. p. 2871. Respondent had a number of policies, procedures, rules, regulations and conditions that medical staff members are required to follow. R. p. 2877; R. p. 2894. Medical staff members are subject to discipline for everything from failure to maintain patient safety to improperly completing medical records according to the Respondent's rules. R. pp. 2884-2885.

Dr. Allen was at all times relevant authorized to perform surgeries at Respondent surgical center. R. p. 2871. Dr. Allen was allowed to continue to operate on patients even after the Respondent discovered Dr. Allen's significant drug abuse and violations of its own policies. R. p. 2808.



Appellants discovered that Dr. Allen had been disciplined by the Board of Podiatry due to a drug abuse problem that came to the Board's attention just a few months prior to Mr. Wainio's surgery, in October, 2009. R. p. 426. Dr. Allen entered into a stipulation and consent order with the Idaho Board of Podiatry on September 15, 2010, regarding the admitted drug abuse and violation of I.C. § 54-608(2). R. p. 1429. The discipline arose as a result of Dr. Allen's diversion and use of Propofol. R. p. 2128. Dr. Allen was reported to the Board by a contract pharmacist for Respondent. R. p. 2136. After being caught, Dr. Allen confessed to his Propofol abuse. R. p. 2128.

Dr. Allen entered an inpatient treatment facility in Oregon in September, 2009. R. p. 302. Dr. Allen returned to his podiatry practice less than two weeks after discharge from rehabilitation (R. p. 1418), which was less than two months before Mr. Wainio sought Dr. Allen's care. R. p. 2003.

Although he did not confess to the Board of Podiatry, Dr. Allen was also addicted to opiates. R. p. 2133. Dr. Allen testified in his deposition that he abused Hydrocodone during 2006 and 2007 until September 2009. R. p. 2787. According to Dr. Allen's 2009 inpatient chemical history record in September, 2009, however, he had been taking 15-20 tablets of Vicodin daily, as well as Darvocet daily for the previous 10 years. R. p. 2133. He also took Tramadol daily and had been using Propofol for a year. R. p. 2133.

According to Dr. Allen, he diverted "about 20 prescriptions of Hydrocodone" that he wrote for his Grandmother. R. p. 640. A fact he also did not share with the Board of Podiatry or the Board of Pharmacy. He also wrote prescriptions for other people, whose empty bottles were

found in Dr. Allen's wastebasket by the cleaning person, Renee Corder. R. pp. 2762-2763. Ms. Corder spoke to both Dr. Allen's assistant Heidi Pritchett, who gave Dr. Allen permission to divert a narcotics prescription in her name, and Dr. Ozeran who confirmed to Ms. Corder that he was aware that Dr. Allen had abusing drugs. R. p. 2754; R. p. 2766.

Ms. Corder found used syringes on the counter in Dr. Allen's office bathroom during the previous three years before she stopped cleaning his office in approximately October, 2009. R. p. 2755; R. pp. 2758-2759; 2766. She also found empty Propofol bottles in the wastebasket in Dr. Allen's office. R. pp. 2755-2759; 2766.

In addition to the other methods of diverting medications from Respondent and others, Dr. Allen would also have patients who had difficulty with pain medications bring those unused medications to him to exchange for a different prescription. R. pp. 2836-2838. Dr. Allen admitted that he received Dilaudid by having a patient return it to him. R. p. 2791.

Ms. Corder expressed to Dr. Ozeran that she was very concerned that Dr. Allen had been allowed to continue performing surgery at Syringa Surgical Center despite the fact that Dr. Ozeran and others knew Dr. Allen was abusing drugs. R. p. 2767. Ms. Corder was very concerned for Dr. Allen's patients. R. p. 2767. Ms. Corder stopped working for Dr. Allen in October, 2009 because she believed that he was a drug addict. R. pp. 2752-2753.

Dr. Allen's wife and office manager, Sherri Allen, also had knowledge of Dr. Allen's drug use three years prior to Dr. Allen attending rehabilitation in September, 2009. According to Ms. Allen, Dr. Ozeran and Richard Snyder, Respondent's Director of Surgical Services, knew

about Dr. Allen's drug use at least three years prior to Dr. Allen going to rehabilitation in September 2009. R. p. 2770.

Whether prescribed or not, Dr. Allen stated that he last used Hydrocodone in September 2009. R. p. 2788. However, Dr. Allen's statement of when he last used Hydrocodone was incorrect. Dr. Allen was prescribed Hydrocodone by his dentist on multiple occasions after September 2009 and after treating Mr. Wainio. R. pp. 2978-2981. Dr. Allen had five prescriptions for Hydrocodone between September, 2011, and February 12, 2012, despite his claims to the contrary in his deposition of April 4, 2013. R. pp. 2980-2981.

#### **D. Standard of Review On Appeal**

##### **1. Motion for Summary Judgment**

When reviewing a grant of summary judgment, this Court's standard of review is the same as that of the district court in ruling upon the motion. Purvis v. Progressive Cas. Ins. Co., 142 Idaho 213, 215, 127 P.3d 116, 118 (2005); *citing*, Thomson v. City of Lewiston, 137 Idaho 473, 475-76, 150 P.3d 488, 490-91 (2002). Therefore, this Court reviews the record before the district court, including the pleadings, depositions, admissions and affidavits, if any, to determine *de novo* whether, after construing the facts in the light most favorable to the nonmoving party, there exist any genuine issues of material fact and whether the successful movant below was entitled to judgment as a matter of law. Id.; *citing*, Tusch Enterprises v. Coffin, 113 Idaho 37, 740 P.2d 1022 (1987); I.R.C.P. 56(c).

## **2. Motions Regarding Appellants' Expert Dr. Wischmeyer**

The admissibility of evidence is committed to the district court's discretion and this Court reviews such rulings for abuse of discretion. Gem State Ins. Co. v. Hutchison, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007). When evaluating whether the district court properly exercised its discretion, this Court conducts, "a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason." Id., *citing*, Sun Valley Shopping Ctr., Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). When a district court commits an error of law while exercising its discretion on the admissibility of evidence, this Court remands the matter back to the district court for appropriate findings according to the correct law. Gem State, 145 Idaho at 15-16; *citing*, Miller v. Haller, 129 Idaho 345, 351, 924 P.2d 607, 613 (1996).

## **IV. ISSUES PRESENTED ON APPEAL**

A. Whether the district court erred when it granted summary judgment to Syringa Surgical Center, LLC by:

1. Finding that Appellants did not allege any negligent conduct by Dr. Allen at the time of or during Mr. Wainio's surgery at Syringa Surgical Center;
2. Finding that Dr. Allen was not an actual or apparent agent of the Respondent at the time that Dr. Allen negligently evaluated Harvey Wainio in his office pre-operatively; and,

3. Finding Syringa Surgical Center, LLC bore no independent liability arising from evidence of its complicity with Dr. Allen's drug abuse.

B. Whether the district court erred by striking the evidence of Appellant's expert, Dr. Wischmeyer, regarding Dr. Allen's drug use by:

1. Creating a new evidentiary standard for the admissibility of expert testimony contrary to the standard set forth by this Court in Nield v. Pocatello Health Servs., Inc., 156 Idaho 802, 332 P.3d 714 (2014);
2. Creating a new evidentiary standard to measure the probative value of expert testimony against the potential prejudice of such evidence; and,
3. Whether the district court's new standard for the admissibility of expert testimony violated the Appellants' constitutional right to a trial by jury by summarily weighing the factual evidence reserved for the trier of fact.

## V. ARGUMENT

### A. **THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO SYRINGA SURGICAL CENTER, LLC**

Whether Respondent Syringa Surgical Center, LLC (hereinafter "Respondent" or "Syringa") is vicariously liable for the acts of Dr. Allen as its actual or apparent agent is an issue of fact. Likewise, whether Respondent breached a duty independently, is also a question of fact. In this matter, the district court either (1) weighed the conflicting evidence presented in the summary judgment briefing and determined for itself the weight to be given to the evidence (a

task that is improper on summary judgment); or (2) ignored the evidence that raises material issues of fact regarding Respondent Syringa's liability for Dr. Allen's negligence.

**1. The District Court Erred By Finding That Appellants Asserted No Negligent Conduct By Dr. Allen At The Time He Performed Mr. Wainio's Surgery At Syringa Surgical Center.**

In its Opinion and Order on Respondent's Motion for Summary Judgment, the district court conceded that, if a principal/agent relationship existed between Respondent and Dr. Allen, that Respondent could be vicariously liable for Dr. Allen's negligence. R. p. 3041.

The district court then found that an agency relationship could only exist in the context of Dr. Allen's conduct as a medical staff member or owner of Respondent Syringa. R. p. 3041. The court reasoned that, because Appellants did not allege that Dr. Allen was negligent in performing the surgery, Respondent could not be held vicariously liable for Dr. Allen's conduct. R. p. 3041. The district court's analysis is clearly erroneous.

The court in this case erred when it ruled that "[u]nder the facts in the record, Plaintiffs have alleged no negligent conduct by Dr. Allen at any time on the day of, or during, the surgical procedure itself." R. p. 3040. What the district court failed to acknowledge is that the Appellants not only alleged Dr. Allen's negligence pre-operatively, but also alleged Dr. Allen's negligence in conducting the surgery on January 21, 2010, in the first instance. R. p. 502. That negligence is imputed to Respondent because Dr. Allen was either an actual or apparent agent of Respondent at the time he performed the surgery.

a. **Appellants Asserted Facts Showing Dr. Allen's Negligence in Conducting the Surgery in the First Instance.**

The district court, while conceding that Respondent could be vicariously liable for Dr. Allen's negligent conduct in the context of his role as a medical staff member or owner, granted summary judgment to Respondent on that point because "Plaintiffs have alleged no negligent conduct by Dr. Allen at any time on the day of, or during, the surgical procedure itself." R. 3040. The court is simply wrong.

Appellants contend and the evidence shows, that adequate blood flow must be present in order to allow for adequate healing post surgery. It follows that if there is insufficient vascularity in the foot to assure sufficient healing post surgery, conducting the surgery in any event is negligent. R. p. 3050.

In its first amended complaint at paragraph 2.8, Appellants alleged as follows:

At the time that Mr. Wainio was seen at Inland Vascular Institute, an arteriogram was performed which demonstrated a complete occlusion of the right SFA from its origin to the level of the popliteal artery down the leg. This included complete occlusion of the peroneal artery's anterior tibial artery and posterior tibial artery. Circulation to the foot preoperatively was by way of collateral circulation established over a lengthy period of time which was insufficient to perfuse the foot post surgery for healing and would not have presented or mimicked pedal pulses. Mr. Wainio was not a surgical candidate for the surgery Defendant Richard M. Allen performed until such time appropriate arterial circulation was re-established.

R. p. 500

Appellants further alleged:

3.2. Defendant Dr. Richard M. Allen individually and as an agent, employee and/or servant of Syringa Surgical Center, negligently, recklessly and tortiously failed to meet the applicable standard of health care practice in the community in

which the care was provided as such standard existed at the time and place of said negligent, reckless and tortious conduct; he failed to exercise the degree of skill, care and learning expected of a reasonably prudent medical provider of like medical and health services in said community in the State of Idaho acting in the same or similar circumstances at the time of the care and treatment provided to Harvey Wainio.

R. p. 502

Pursuant to the principle that Idaho is a “notice pleading” state, Appellants are only required to indicate some theory of recovery supporting the relief sought. Brown v. City of Pocatello, 148 Idaho 802, 229 P.2d 1164 (2010). The theory of recovery in this case is that Dr. Allen was negligent and breached the standard of care by performing the surgery at all. Respondent is liable because Dr. Allen was either an actual or apparent agent when he performed the surgery. Both of those theories of liability are clearly set forth in Appellants’ pleading. Additionally, at hearing on the matter, Appellants’ counsel made clear that Appellants’ claims include a failure of the standard of care for performing the surgery in the first place:

Defendant re-characterizes Plaintiffs' case to favor this argument they have made by parsing out only the failure to appreciate pulses as the only act of negligence; of course, it's not. The Plaintiffs allege and assert that it was negligent to do the surgery at Syringa Surgical Center because this was not a surgical candidate. The surgery shouldn't have been done. He didn't have -- Mr. Wainio did not have the requisite pulses in the lower extremity. So conducting the surgery is negligent and that's always been the issue in this case; and it's no different. And that was done today and that was done at Syringa Surgical Center.

November 6, 2014, Summary Judgment Hearing, Tr. p. 213.

The district court’s assertion that the Appellants did not allege negligence on the day of, or during, the surgery is simply incorrect. The district court erred and the case should be remanded for further proceedings.



b. **There is a Material Issue of Fact Whether Dr. Allen was an Actual or Apparent Agent of Respondent at the Time of the Surgery.**

The existence of an agency relationship is a question of fact to be resolved from the evidence by the jury. American West Enterprises, Inc. v. CNH, LLC, 155 Idaho 746, 316 P.3d 662 (2013); Adkison Corp. v. American Bldg. Co., 107 Idaho 406, 690 P.2d 341 (1984) *citing* Clark v. Gneiting, 95 Idaho 10, 501 P.2d 278 (1972). An agency is a relationship resulting from “the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” Restatement (Second) of Agency § 1, at 7 (1958). Herbst v. Bothof Dairies, Inc. 110 Idaho 971, 719 P.2d 1231 (Ct.App. 1986).

It is black letter law that a principal who conducts an activity through his agent is subject to liability for the agent’s conduct. Sharp v. W.H. Moore, Inc., 118 Idaho 297, 796 P.2d 506 (1990), *citing* Bailey v. Ness, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985); and Restatement (Second) of Agency § 251 (1958). *See also* Restatement (Third) Of Agency § 7.05 (2006). A principal is liable for the acts of the agent when an actual agency relationship exists, and the principal has conferred express or implied authority. *See* Caballero v. Wikse, 140 Idaho 329, 332, 92 P.3d 1076, 1079 (2004).

An express grant of authority means that the principal has directed the agent accordingly. An implied grant of authority is that which is conferred by the principal to the agent that is usual and necessary to carry out the objectives of the principal. Caballero v. Wikse, 140 Idaho at 332, 92 P.3d at 1079. Indicia of an express agency relationship “does not have to be established by direct or positive proof, but may be inferred from dealings, circumstances, acts and conduct.”

Id. The “dealings, circumstances, acts and conduct,” in combination with the inferences, will support a finding of express actual authority. Caballero v. Wikse, 140 Idaho at 332, 92 P.3d at 1079.

In this case, Respondent conferred actual authority on Dr. Allen to act on its behalf in conducting surgeries in its facilities, and to earn a profit for the facility. Dr. Allen is a member of the LLC whose purpose is to operate a surgical center for a profit. R. p. 2877.

Respondent Syringa is a member managed limited liability company. R. p. 2860. Dr. Allen is a member with two others and, thus, a manager. R. p. 2860. Pursuant to I.C. § 30-6-407 certain authority to act on behalf of the LLC is conferred.

(2) In a member-managed limited liability company, as among the members, the following rules apply:

- (a) The management and conduct of the company are vested in the members.
- (b) Each member has equal rights in the management and conduct of the company's activities.
- (c) A difference arising among members as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members.
- (d) An act outside the ordinary course of the activities of the company may be undertaken only with the consent of all members.
- (e) The operating agreement may be amended only with the consent of all members.

I.C. § 30-6-407(2)

Only a member of the medical staff may admit patients to Respondent. R. p. 2895. In order to conduct surgeries at Respondent, a member must become a member of the medical staff. R. p. 2895. Becoming a member of the medical staff requires consent to be bound by the staff bylaws, and rules and regulations of Respondent, which includes controlling the way in which a

member treats his patients, performs surgeries, and maintains medical and patient records. R. p. 2871; 2895.

All members of the Medical Staff must agree to abide by the policies, Bylaws, Rules and Regulations of the Organization.

R. p. 2895 (emphasis added.)

The purposes of the medical staff are set forth in Article II, Section 1 of the Staff Bylaws:

Section 1 Purposes.

The purposes of the Staff are:

- a. To be the formal organizational structure through which (1) the benefits of membership on the Staff may be obtained by individual Practitioners and (2) the obligations of Staff membership may be fulfilled;
- b. To serve as the primary means for accountability to the Board for the appropriateness of the professional performance and ethical conduct of its members and affiliates and to strive toward patient care in the Surgical Center that meets the standard of health care practice applicable to communities of essentially the same size and nature of Lewiston, Idaho, with consideration of health care facilities usually available in such communities;
- c. To provide an appropriate educational setting that will maintain scientific standards and that will lead to continuous advancement in professional knowledge and skill of the Surgical staff;
- d. To provide a means whereby issues concerning Staff and Surgical Center may be discussed by the Staff with the Board and the Administrator.

R. p. 2878.

At all relevant times Dr. Allen was part of the Medical Staff and subject to Respondent's rules, regulations and bylaws, including potential corrective action by Respondent. R. p. 2879-2882. Respondent controlled the administration of surgical services performed by Dr. Allen at the Respondent facility. R. p. 2871.

The rules and regulations set forth a number of controls on the conduct of the medical staff and the way in which patient care is performed. Some examples are that the “attending practitioner” will only be allowed to schedule procedures that are identified on their case list and which have been approved by the Governing Body. R. p. 2895. Patients may only be discharged by a written order when discharge criteria have been met. R. p. 2896. All medical staff must also adhere to a separate set of policies and procedures set forth in the facility policy and procedure manuals that “may be reviewed in the Administrator’s office.” R. p. 2900.

Medical staff bylaws require annual application to remain a part of medical staff. The bylaws also require attendance at Medical Staff meetings. Respondent supplies the drugs for use by the medical staff and it instituted policies related to drugs to which all medical staff must adhere. R. p. 2873-2874.

There are sufficient facts for the trier of fact to find that Dr. Allen was acting on behalf of Respondent, promoting Respondent’s best interests, and was subject to Respondent’s control when he conducted the surgery on Mr. Wainio on January 21, 2010. Dr. Allen’s negligence in conducting the surgery is imputed to Respondent. The district court’s grant of summary judgment should be reversed and the case remanded.

**2. The District Court Erred By Finding That Dr. Allen Was Not An Actual Or Apparent Agent Of The Respondent At The Time That Dr. Allen Negligently Evaluated Harvey Wainio Pre-Surgically.**

The district court erroneously found that Appellants’ claims against Respondent fail because there were no facts to show there was an agency relationship between Dr. Allen and Respondent at the time he examined Mr. Wainio and erroneously palpated pedal pulses. R. p.

3041. The district court further erroneously found that “any agency relationship that exists between Syringa and Dr. Allen is limited to Dr. Allen’s conduct as a medical staff member or owner of Syringa.” R. p. 3041. The court completely ignores the indicia of apparent authority in this context. At the time that Mr. Wainio consulted with Dr. Allen in his office on January 4 and January 18, Dr. Allen was cloaked with the authority of Respondent.

Apparent authority does not presuppose the existence of an actual agency relationship.<sup>1</sup> Jones v. Healthsouth Treasure Valley Hospital, 147 Idaho 109, 113, 206 P.3d 473, 477 (2009). Apparent authority applies to “*any set of circumstances*” under which it is reasonable for a third party to believe that an agency has authority, so long as the belief is traceable to the manifestation of the principal. Id.

In the case of Jones v. Healthsouth Treasure Valley Hospital, this Court made it clear that the doctrine of apparent agency creates tort liability on the part of a principal for its agent’s conduct even when there is no actual agency relationship. Jones v. Healthsouth Treasure Valley Hospital, 147 Idaho at 114, 206 P.3d at 478.

This Court, in expressly adopting the doctrine of apparent authority to impute tort liability to a principal, held:

Under section 429 of the Restatement (Second) of Torts, liability is imputed to a principal ‘who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants....’ Id. at § 429. When determining liability...when an agency relationship is alleged, the Restatement (Second) of Torts defers to the Restatement of Agency. Id. at § 429, comment c. Section 2.03

---

<sup>1</sup> The terms “apparent authority” and “apparent agency” may be used interchangeably. Jones v. Healthsouth Treasure Valley Hospital, 147 Idaho at 113, 206 P.3d at 477.

of the Restatement (Third) of Agency defines ‘apparent authority’ as ‘the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.’ Restatement (Third) of Agency, § 2.03 (2006). The rationale for imposing liability under apparent authority is so ‘[a] principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequence of their acts offers an advantage.’ *Id.* at § 2.03, comment c.

Jones v. Healthsouth Treasure Valley Hospital, 147 Idaho 109, 113, 114, 206 P.3d 473, 477, 478 (2009).

In the Jones case, Mrs. Jones was scheduled to undergo lumbar spine surgery. There were two hospitals from which to choose for the surgery. Mrs. Jones chose Treasure Valley Hospital. As part of the procedure, her physician elected to have Mrs. Jones's blood “salvaged” during surgery. The process required that blood be collected from the patient intra-operatively and made available for reinfusion into the patient's body using a cell saver machine. *Id.* At 111, 475. Mrs. Jones’ physician placed the order for the services. Independent contractors, through another company, were engaged to perform the services. *Id.* One of the contractors conducting the procedure placed a pressure cuff on the infusion bag to make the process go more quickly. *Id.* Placement of the pressure cuff was in contravention of the instructions for the process. The pressure cuff eventually squeezed the air from the bag into Mrs. Jones’ body causing a fatal air embolism. *Id.*

The plaintiffs sued the hospital under the theory of apparent authority for the negligence of the contractor who was infusing Mrs. Jones. The district court granted summary judgment in favor of the hospital, and the plaintiffs appealed. This Court held that the hospital could be

vicariously liable for Dr. Jenkins' negligence, even though she was a contractor and not an actual agent of the hospital. The Jones case extended the doctrine of apparent agency to medical malpractice cases in Idaho, including negligent physicians:

TVH contends that a more reasonable inference is that the legislature intended that a hospital could be held vicariously liable under the doctrine of respondeat superior rather than the doctrine of apparent authority. However, there is no language in the statute limiting the basis from which vicarious liability claims may be made. Idaho Code § 6-1012 states that a claimant may bring an action against a healthcare provider or any person vicariously liable for the provider's negligence. Although the term "vicarious liability" is not defined under the Act, it is defined generally as "[l]iability that a supervisory party bears for the actionable conduct of a subordinate or associate based on the relationship between the two parties." *Blacks Law Dictionary* 934 (8th ed.2004). Section 429 of the Restatement (Second) of Torts, which imposes tort liability to a principal under the doctrine of apparent agency, states as follows:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

*Restatement (Second) of Torts* 429 (1965). Pursuant to this section, the hospital's liability arises out of the apparent agency relationship it creates with its independent contractor and thus falls under the definition of vicarious liability. Furthermore, the Restatement (Third) of Agency specifically states that a principal is vicariously liable for a tort committed by an agent acting with apparent authority. *Restatement (Third) of Agency* 7.08 (2006). As such, we find that the extension of apparent agency to medical malpractice claims is consistent with the Act's provision for vicarious liability.

Jones v. Healthsouth Treasure Valley Hospital, 147 Idaho 109, 115, 206 P.3d 473, 479 (2009).

In this case, just as in the Jones case, Dr. Allen had all of the trappings of authority. Mr. Wainio was referred to Dr. Allen by another physician. R. p. 2903. Dr. Allen's office is in the same building directly below Syringa. Allen's office and Syringa are connected by a stairwell.

R. p. 2903. There is no evidence that Dr. Allen gave Mr. Wainio any meaningful option of where his surgery would take place. R. p. 2907. The consent form disclosing Dr. Allen's interest in Syringa, and purportedly giving Mr. Wainio a choice of where he wanted Dr. Allen to perform the surgery, was not signed until 7:30 a.m. on the day of surgery. R. p. 2915-2916.

The consent and patient rights and responsibilities documents that Mr. Wainio signed in Dr. Allen's office on January 18, 2010, are from "Syringa Surgery Center" at the top. *See* R. pp. 2908, 2910, 2911. The consent form lumps the services of the Surgery Center and the physician together, making Dr. Allen and the Respondent indistinguishable:

FINANCIAL RESPONSIBILITY: [...]AUTHORIZATION TO RELEASE INFORMATION: I hereby (sic) authorize my physician to give my insurance company or company's (sic) any and all information they may require concerning my case, and agree to pay all charges made by Syringa Surgery Center regarding services rendered to me...

R. p. 2911

FOR MEDICARE PATIENTS: I request payment of authorized Medicare benefits to me, or in my behalf, for any services furnished to me by or at Syringa Surgery Center, including physician services...

R. p. 2911(emphasis added).

Dr. Allen told Mr. Wainio he needed surgery and that the surgery would be a "piece of cake." R. p. 2904. Dr. Allen also told Mr. Wainio that he had done hundreds of these surgeries.

R. p. 2905.

Dr. Allen had a duty to Respondent a member of the LLC to maintain an active medical practice that utilizes the surgical center in order to make a profit for the center:



Section 10.6A. Obligation to Sell Upon Winding Down of Practice. Each of the Members who are parties to this Agreement at the time of execution, have an active medical practice which utilizes the Company's surgical center. The Members believe that it is in the best interests of the Company that all Members...should be operating full time medical practices. Therefore if a Member is no longer operating a full time medical practice for any reason whatsoever, the Member shall be obligated to sell his interest, and the company and/or the other Members shall be obligated to purchase said interest...

R. p. 2864. Thus, Dr. Allen's activities were directly for the advancement of, and specifically related to, the objectives of Respondent.

Finally, the post-operative instructions given to Mr. Wainio after surgery have both Syringa Surgical Center and Dr. Richard Allen's name at the top. R. p. 2912. The form does not distinguish Respondent from Dr. Allen. At the bottom of the form is the pre-printed telephone number of "your physician," presumably, the telephone number is Dr. Allen's. R. p. 2912.

Just as in the Jones case, there were circumstances that would lead a reasonable person to believe that Allen was an agent for Respondent. Dr. Allen's office was in the same building as the surgical center (Mr. Wainio testified that Dr. Allen's office was "in the surgical center, down below it" R. p. 2903). Dr. Allen had Mr. Wainio sign Respondent's forms in his office and then maintained those forms. There is no evidence that Dr. Allen gave Mr. Wainio a meaningful choice of where the surgery would be performed. It was reasonable for Mr. Wainio to draw the conclusion that Dr. Allen was an agent of Respondent at the time that Dr. Allen examined Mr. Wainio on January 4 and January 18, 2010, preoperatively.

**3. The District Court Erred By Finding Respondent Bore No Independent Liability Arising From Evidence Of Its Knowledge of and Tolerance For Dr. Allen's Drug Abuse.**

In its ruling on summary judgment in favor of Respondent, the Court determined that evidence Appellants relied upon to show that Respondent should be vicariously liable for the negligence of Dr. Allen was based upon evidence it had already ruled inadmissible. In footnote 5 of its Opinion and Order on Respondent's Motion for Summary Judgment the Court held:

In their brief opposing Syringa's Motion, Plaintiffs rely on evidentiary facts the Court has ruled inadmissible to support their assertion a principal-agent relationship exists that makes Syringa vicariously liable. The court's analysis, however, cannot take into account any inadmissible evidence.

R. p. 3040.

The question then, is whether the facts relied upon by Appellants that are referred to in Footnote 5 are in fact inadmissible, or whether the district court erred when it found that the evidence of Dr. Allen's illicit drug use which was known to Respondent, should have been considered by the district court when ruling upon summary judgment.

Appellants alleged Respondent's negligence in their first amended complaint as follows:

2.11. Defendant Syringa Surgical Center, LLC, had an independent duty to monitor its agents and to assure its doctors, including Dr. Allen, were unimpaired and competent to meet the applicable standard in the care and treatment of Harvey Wainio. The applicable standard of care at the time and place included, but was not limited to, reasonably assuring Dr. Allen was not under the influence of, or affected by, any substance that would impair his ability to provide medical care and treatment to Harvey Wainio. Based upon information and belief, Plaintiffs allege that Defendant Syringa Surgical Center, LLC, breached this duty.

2.12. Defendant Syringa Surgical Center, LLC, had a duty to monitor its drug inventory to assure that its drugs were not being improperly misused by its agents, employees or physicians. It further had a duty to take adequate and reasonable

precautions to maintain the safety and security of its drugs upon discovery that an agent, employee, or physician has misused its drugs.

R. p. 501

It is an issue of fact whether Dr. Allen was impaired at the time he conducted surgery on Mr. Wainio. Therefore, it is also an issue of fact whether Respondent is vicariously liable for Dr. Allen's negligence by its failure to maintain the security of its medications, particularly when it knew Dr. Allen was diverting Propofol and had been for quite some time. R. p. 2770. As is discussed more fully in Section B below, the Court improperly weighed the evidence regarding whether Dr. Allen had relapsed when he conducted the surgery on Mr. Wainio. Thus, the Court improperly excluded evidence of Dr. Allen's drug diversion and use.

According to Renee Corder, Dr. Ozeran, a member of respondent and appointment medical director, knew about Dr. Allen's drug use. R. pp. 2921-2922. Dr. Ozeran admitted he knew of Dr. Allen's drug use for about a year. R. p. 2924. Sherri Allen's contemporaneous journal notes indicate Dr. Ozeran knew for three years prior to September, 2009. R. p. 2770.

In any event, Respondent violated its own policies, procedures, regulations and bylaws by allowing Dr. Allen to continue to conduct surgery with a known drug problem; and by allowing access to the drugs that Dr. Allen was abusing.

Respondent negligently monitored and misused its medications when Dr. Allen diverted Propofol and other drugs for his own use. Further, Respondent was negligent by not assuring Dr. Allen had the requisite skill and ability to perform surgeries, particularly under his drug-infused state during 2009 and, Appellants contend, 2010. Renee Corder herself expressed this concern

based upon the type and volume of drugs she found in Dr. Allen's possession, including Propofol, likely taken from the Respondent. R. pp. 2918-2919.

**B. THE DISTRICT COURT ERRED BY STRIKING THE EVIDENCE OF APPELLANTS' EXPERT, DR. WISCHMEYER, REGARDING DR. ALLEN'S DRUG USE**

Prior to holding Dr. Wischmeyer's testimony inadmissible, the district court weighed evidence, criticized Dr. Wischmeyer for not considering evidence the district court believed indicated Dr. Allen had not relapsed, afforded defense witnesses undue credibility, and questioned the reliability of witnesses Dr. Wischmeyer relied upon. By doing so, the district court created a new standard for the admissibility of expert testimony and determining whether the probative value of evidence is outweighed by its prejudice. As a result, the district court committed an error of law and this Court should remand this matter back to the district court for findings regarding the admissibility of Dr. Wischmeyer's testimony according to the proper standards, set forth below.

**1. The District Court Erred In Creating A New Evidentiary Standard For The Admissibility Of Expert Testimony Contrary To The Standard Set Forth By This Court In Nield V. Pocatello Health Servs., Inc., 156 Idaho 802, 332 P.3d 714 (2014).**

In Nield v. Pocatello Health Servs., Inc., 156 Idaho 802, 332 P.3d 714, (2014), this Court set forth the standard for the admissibility of expert testimony. Expert testimony is admissible if, "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." I.R.E. 702; *see also* Nield, 156 Idaho at 816. "The foundation for the admission of opinion testimony based upon scientific knowledge includes

both that the witness is an expert in the field and that there is a scientific basis for the expert's opinion.” Swallow v. Emergency Med. of Idaho, P.A., 138 Idaho 589, 593, 67 P.3d 68 (2003); *citing* State v. Faught, 127 Idaho 873, 908 P.2d 566 (1995); *see also* Nield, 156 Idaho at 816. In order to determine the admissibility of expert testimony, the court should evaluate, “the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion.” Id.

The court should act as a gatekeeper rather than a fact finder in determining the admissibility of expert testimony. Id. at 811; *see also* United States v. Sandoval-Mendoza, 472 F.3d 645, 654 (9th Cir. 2006). Determining the admissibility of expert testimony is not an adversarial process. Id. The court should not weigh the credibility of the facts forming the basis of the expert’s opinion, but rather, should only consider whether the facts, if taken as true, support the expert’s testimony rendering it admissible. Id. An expert’s ultimate conclusion is not determinative of admissibility; rather it is the legitimacy of the expert’s reasoning and methodology. Id. at 816; *citing* Coombs v. Curnow, 148 Idaho 129, 140, 219 P.3d 453, 464 (2009).

In evaluating the admissibility of an expert’s testimony, the court should not weigh the testimony of the expert against other witnesses or make determinations as to the credibility of the expert, rather the expert’s opinion should be judged on its own merits against the requirements of I.R.E. 702. Nield, 156 Idaho at 816. Further, an expert is not required to address every possibility and opinion offered by the defense. Id. Expert testimony that rises above speculation and is based upon facts in the record is admissible because it is helpful to the trier of fact. Id. at 816-18.

The Nield case is instructive on the standard to be applied by a district court in determining the admissibility of expert testimony. In Nield, this Court concluded that a district court exceeded its authority, becoming a fact finder rather than gatekeeper, and held that the expert testimony was admissible and credibility issues regarding the expert's testimony were the within the province of the jury. Nield, 156 Idaho at 816-18. In determining that the district court had exceeded its authority, this Court noted that the Appellants' expert had reviewed a number of medical records and derived his opinions from the facts in the records along with his own medical knowledge and experience. *Id*; *see also* United States v. Sandoval-Mendoza, 472 F.3d 645, 655 (9th Cir. 2006)(*explaining* that medical knowledge is often complex and uncertain, the standard for admissibility of testimony from a physician is thus whether other physicians would accept it as reliable, a determination as to the credibility of the testimony should be left to the jury).

Further, this Court explained that it is not necessary for a party to prove a specific issue by direct and positive evidence, rather it is only necessary that the party show a chain of circumstances from which the specific issue is reasonably and naturally inferable. Nield, 156 Idaho at 816-18.

In the instant case, the district court unquestionably exceeded its authority in determining the admissibility of evidence of Dr. Wischmeyer's testimony, becoming a fact finder, rather than gatekeeper. The district court created its own standard for admissibility, which included weighing the credibility of evidence and comparing Appellants' expert, Dr. Wischmeyer's,

opinions to evidence presented by the defense, in direct conflict with the standard set forth in Nield.

Dr. Wischmeyer's testimony that Dr. Allen was more probably than not under the influence of drugs at the time he provided negligent treatment to Mr. Wainio, and the evidence supportive thereof, was first considered by the district court in Dr. Allen's Motion *in limine*. R. p. 2254-59. Dr. Allen moved to strike the Affidavits of Beatrice L. Shatto (Mrs. Shatto) and Dr. Wischmeyer, submitted by Appellants to provide the foundation for Dr. Wischmeyer's testimony that the Defendant was more probably than not under the influence of drugs at the time in question. Id.

Importantly, prior to ruling on Dr. Allen's motion *in limine*, the district court denied the motion to strike the Affidavits, noting, "... the Court finds it may be necessary to consider the affidavits in order to rule on Defendant Allen's Motion *in limine*..." R. p. 2255. The district court set forth the evidence submitted by the Appellants which provided the foundation for Dr. Wischmeyer's ultimate opinion that Dr. Allen had relapsed and was under the influence of drugs. R. p. 2257. The district court noted that Mrs. Shatto stated in her Affidavit that, "Dr. Allen seemed overly happy, his eyes seemed glimmery, and his depth perception appeared impaired," and Dr. Wischmeyer stated that the fact that Dr. Allen was able to palpate pedal pulses in Mr. Wainio when it was impossible to do so supported his conclusion that Dr. Allen was under the influence of drugs at the time he provided care to Mr. Wainio. Id.

Despite considering the Affidavits, the district court went on to state, "In the instant matter, the Court finds no evidence to support Plaintiffs' theory that Dr. Allen likely relapsed in

January 2010.” R. p. 2256. The district court then recited the evidence presented by Dr. Allen and the Respondent in support of their contention that evidence of Dr. Allen’s drug use should be struck. R. p. 2256-57.

After weighing the evidence presented by the parties, the district court ruled that Dr. Wischmeyer’s testimony was inadmissible. R. p. 2259. Despite the evidence from Mrs. Shatto’s and Dr. Wischmeyer’s Affidavits, the district court stated:

[P]laintiffs have presented no evidence Dr. Allen was under the influence of any drugs in January 2010 when Dr. Allen says he palpated pedal pulse in Wainio’s right foot. Rather, Plaintiffs’ theory rests solely on Dr. Wischmeyer’s conjecture and speculation that Allen likely relapsed, despite the absence of adequate factual evidence upon which such a conclusion could lie.

R. p. 2257. In support of its ruling, the district court explained, “The Court is not **persuaded that an adequate foundation with sufficient reliability** has been laid for the expert opinion that a factual event, relapse, occurred.” Id [**emphasis added**]. Additionally, the district court agreed with the Respondent and Dr. Allen that not one of the witnesses expressed concern with Dr. Allen’s post-rehabilitation behavior or treatment of patients, and that Dr. Allen’s drug tests were all negative. Id.

The only conclusion that can be reached, based upon the district court’s own statements, is that the district court weighed the evidence presented by the parties, including comparing Dr. Wischmeyer’s testimony to the testimony of other witnesses, and faulting Dr. Wischmeyer for not considering certain facts, even though he addressed those facts. The district court questioned the credibility of the evidence Dr. Wischmeyer relied upon and found it unsatisfactory, which was a clear violation of the standard for admissibility of expert testimony set forth in Nield.



The district court considered, for a second time, the admissibility of Dr. Wischmeyer's testimony in Plaintiffs' Motion *in Limine* Re Drug Use and Motion for Permissive Appeal. R. p. 3030-35. At the outset of its ruling, the district court stated that Dr. Wischmeyer was qualified as an expert on the subject of physician drug abuse, that his opinions were supported by peer reviewed studies, and that the district court's ruling was based solely on the court's belief he lacked a factual foundation for his testimony. R. p. 3032-33.

The district court also found that Appellants sought admission of evidence that Dr. Allen had relapsed **despite** "Dr. Allen having completed drug rehabilitation and **despite** monitoring safeguards in place to detect any drug use at the time he was treating Harvey Wainio..." R. p. 3031 [**emphasis added**]. The district court added that it had previously ruled Dr. Wischmeyer's testimony inadmissible because it had determined there was inadequate foundation for the testimony. *Id.*

In support of its ruling, the district court explained, "... the Court must examine the basis on which Dr. Wischmeyer reaches his factual conclusion." R. p. 3033. Once again, in direct contravention of the Nield case, the district court faulted Dr. Wischmeyer for not considering evidence tending to suggest Dr. Allen had not relapsed, clearly ignoring those portions of Dr. Wischmeyer's Affidavits addressing the inadequacy of Dr. Allen's inpatient drug rehab stay, and drug testing. R. p. 3034. Further, such criticism of Dr. Wischmeyer's opinions required the district court to improperly compare his opinions to the evidence submitted by the Respondent and Dr. Allen. *Id.*

The district court stated Dr. Wischmeyer was not relying upon **reliable** evidence in reaching his conclusions, a clear and improper commentary on the evidence upon which Dr. Wischmeyer relied. R. p. 3032-33 [**emphasis added**]. In support of this contention, the district court criticized Dr. Wischmeyer for trusting the accuracy of Mrs. Shatto's statements that Dr. Allen seemed overly happy, his eyes seemed glimmery, and his depth perception appeared impaired. R. p. 3034. Finally, the district court acknowledged there were issues with Dr. Allen's drug testing and its reliability, despite earlier in its ruling stating the drug testing proved Dr. Allen was not under the influence of drugs at the time he treated Mr. Wainio. Id. Dr. Allen was regularly drug testing while he was also admittedly taking Hydrocodone for dental pain. R. pp. 2988-2996.

The district court's orders regarding the admissibility of Dr. Wischmeyer's testimony clearly indicate that the district court created its own standard for the admissibility of expert testimony rather than employing the standard set forth in the Nield case. The standard created by the district court here empowers courts, rather than juries, to weigh the credibility of evidence and find for plaintiffs or defendants. The standard created by the district court invades the province of the jury. In the criminal justice context, this improper standard would empower a court rather than a jury, to determine guilt or innocence in cases where criminal activity can only be proved by expert testimony, because the court is able to weigh the credibility of evidence relied upon by an expert, prior to admitting expert testimony on the issue.

Under the standard created by the district court, the court, rather than a jury, could make the determination of guilt or innocence unless there was concrete evidence of criminal activity,

evidence which may be absent in criminal cases. For instance, if a court were permitted to weigh the credibility of evidence in order to determine the admissibility of expert testimony, the court could consider the credibility of statements by victims of child molestation prior to determining the admissibility of expert testimony on that issue. Where the victim is too young or mentally incompetent and unable to testify, expert testimony may be the only evidence available to the prosecution. In such a scenario, the court, rather than the jury, would be determining the guilt or innocence of the defendant. This scenario demonstrates why the standard for review applied by the district court in this case should be rejected.

Under the Nield case, the district court was required to assume that the facts forming the basis for Dr. Wischmeyer's opinion were true and make the determination whether those facts provided the foundation for Dr. Wischmeyer's opinions. Nield, 156 Idaho at 811. Additionally, the district court was not permitted to compare the evidence relied upon by Dr. Wischmeyer to evidence provided by the Respondent and Dr. Allen. The district court was not permitted to require that Dr. Wischmeyer consider certain evidence proffered by the Respondent and Dr. Allen. Id at 816. Nonetheless, the district court did just that.

As a result, the district court abused its discretion by applying an incorrect legal standard for the admissibility of expert testimony. Therefore, Appellants respectfully request the Court reverse the district court's ruling holding Dr. Wischmeyer's testimony inadmissible and remand this matter back to the district court for a determination of the admissibility of Dr. Wischmeyer's testimony according to the proper standard set forth in Nield.

**2. The District Court Erred In Creating A New Evidentiary Standard To Measure The Probative Value Of Expert Testimony Against The Potential Prejudice Of Such Evidence.**

The district court also created an improper standard for evaluating whether the probative value of Dr. Wischmeyer's testimony was outweighed by unfair prejudice of the evidence because, again, the district court weighed the credibility of the foundation for and even Dr. Wischmeyer's testimony itself, in ruling the evidence inadmissible under I.R.E. 403. Evidence is not "unfairly prejudicial" merely because it is detrimental to the opposing party's case; nearly all evidence offered against a party is detrimental and therefore prejudicial to their case. State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905 (1994).

In order to be "unfairly prejudicial" the evidence must suggest to the jury that they decide the case on an improper basis. Id. citing Wade v. Haynes, 663 F.2d 778, 783 (8th Cir. 1981). "Unfairly prejudicial" evidence is evidence that harms a party "not because of inferences that can reasonably be drawn from the facts, but because it inflames the jury and rouses them to 'overmastering hostility'." State v. Gauna, 117 Idaho 83, 88, 785 P.2d 647, 652 (Ct. App. 1989)

Although this Court has not considered whether a court may weigh the credibility of evidence prior to engaging in the I.R.E. 403 balancing test, federal courts have expressly rejected considering the credibility of evidence prior to engaging in the test. "Weighing probative value against unfair prejudice under [Rule] 403 means probative value with respect to a material fact **if**

**the evidence is believed**, not the degree the court finds it believable.<sup>2</sup>” United States v. Evans, 728 F.3d 953, 963 (9th Cir. 2013); *citing* 22 C. Wright & K. Graham, Federal Practice & Procedure: Evidence, § 5214, at 265–66 (1978)(*internal citation omitted*)[**emphasis added**]. Conflicts in evidence go the weight, not admissibility of evidence. Evans, 728 F.3d at 963; *quoting* United States v. Candoli, 870 F.2d 496, 509 (9th Cir. 1989).

A court may not exclude or discount relevant evidence on the basis that the court does not find the evidence credible. Evans, 728 F.3d at 963. Evidence Rule 403 is an extreme remedy to be used sparingly and only in circumstances where the prejudicial danger *substantially* outweighs the probative value of evidence. United States v. Reyes, 660 F.3d 454, 464 (9th Cir. 2011); *see also* United States v. Mende, 43 F.3d 1298, 1302 (9th Cir. 1995); *and* State v. Gauna, 117 Idaho 83, 88, 785 P.2d 647, 652 (Ct. App. 1989).

Again, in the instant case it is clear the district court weighed the credibility of Dr. Wischmeyer’s testimony and its foundation when it engaged in the IR.E. 403 balancing test. It was improper for the district court to do so because in determining the probative value of evidence, the district court must treat the evidence as fact. Evans, *supra*. As explained above, the district court criticized Dr. Wischmeyer for failing to consider certain evidence the district court deemed important, ignoring Dr. Wischmeyer’s explanations for considering or discounting evidence. R. p. 2255-58, 3030-36. The district court was also critical of the evidence Dr.

---

<sup>2</sup> When language in an Idaho civil rule is identical to the language of its federal counterpart, Idaho courts should interpret the Idaho civil rule in conformance with its federal counterpart. Obendorf v. Terra Hug Spray Co., Inc., 145 Idaho 892, 897, 188 P.3d 834 (2008).

Wischmeyer relied upon. R. p. 3032-34. In the district court's second opinion on the matter, the district court held:

When ruling on the admissibility of evidence, the Court must also examine the proposed evidence under I.R.E. 403. As stated by the Court in its February 2014 ruling: (a) in the instant matter there is no reliable evidence Dr. Allen was using or abusing drugs in 2010 when he was treating Harvey Wainio; (b) the evidence shows Dr. Allen was being strictly monitored for any use of drugs during that same time period (though it is of concern that testing did not include propofol); (c) even if evidence of Dr. Allen's drug abuse prior to 2010 was relevant, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. The Court remains of the opinion that any probative value regarding Dr. Allen's pre-rehabilitation drug use is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.

R. p. 3034-35. There can be no doubt that the district court's disbelief of the foundation for Dr. Wischmeyer's testimony was a critical factor in the district court's determination that the probative value of the testimony was outweighed by unfair prejudice.

Once again, permitting a court to evaluate the credibility of evidence prior to ruling the evidence inadmissible under I.R.E. 403 allows the court to invade the province of the jury. In the criminal context, the I.R.E. 403 balancing test employed by the district court in this case would permit courts to evaluate the credibility of witnesses such as informants and defendants who have entered plea deals prior to determining whether the testimony of such witnesses is more probative than prejudicial. This is highly problematic because the determination of the credibility of such witnesses is clearly the province of the jury, not the court.

Allowing the district court to consider the credibility of evidence prior to engaging in the I.R.E. 403 balancing test would turn the test on its head and make the critical element of the test

the credibility of the evidence in the eyes of the court. Juries would be limited to hearing only evidence the court believed because evidence the court doesn't find credible would never be found to be more probative than prejudicial.

Appellants respectfully request the Court reject the I.R.E. 403 balancing test engaged in by the district court, overturn the court's finding that Dr. Wischmeyer's testimony was more prejudicial than probative, and remand this matter back to the district court for a determination of the admissibility of the testimony without weighing the credibility or the testimony or its foundation. Instead, the district court should be instructed that it is to treat Dr. Wischmeyer's testimony and its foundation as true in determining whether the probative value of the evidence outweighs its prejudicial effect.

**3. The District Court's New Standard For The Admissibility Of Expert Testimony Violated The Appellants' Constitutional Right To A Trial By Jury By Summarily Weighing The Factual Evidence Reserved For The Trier Of Fact.**

The trial court's ruling striking Dr. Wischmeyer's testimony, when the court applied improper standards and weighed evidence, interferes with Appellants' right to a trial by jury, as guaranteed under the Idaho State Constitution. The Idaho Constitution guarantees the right to a jury trial as it existed at common law at the time the Idaho Constitution was adopted. Kirkland v. Blaine County Medical Center, 134 Idaho 464, 467, 4 P.3d 1115, 1119 (Idaho, 2000) *citing* State v. Bennion, 112 Idaho 32, 37, 730 P.2d 952 (1986). As early as 1871, common law in Idaho recognized it was the responsibility of the jury to award reasonable, noneconomic damages. Kirkland, 134 Idaho at 467 *citing* Cox v. North-Western Stage Co., 1 Idaho 376 (Id. Terr.,

1871)(Affirming a jury's award of non-economic damages to an injured passenger on a stage coach because it was the province of the jury to determine damages and the jury had not abused its discretion). A long line of cases in Idaho has upheld the notion that reasonably determined damages by a jury should not be disturbed. Garrett v. Taylor, 69 Idaho 487, 489, 210 P.2d 386, (1949)(Citing Reinhold v. Spencer, 53 Idaho 688, 26 P.2d 796 (Idaho, 1933)). It is up to the jury, as the trier of fact, to weigh the credibility of admissible expert testimony. Coombs v. Curnow, 148 Idaho 129, 137, 219 P.3d 453 (2009) citing City of McCall v. Seubert, 142 Idaho 580, 585, 130 P.3d 1118, 1123 (2006).

As explained above, the district court invaded the province of the jury by weighing the credibility of Dr. Wischmeyer's testimony, and the credibility of the foundation for his testimony, prior to determining its admissibility. The district court also invaded the province of the jury when it determined whether his testimony was more prejudicial than probative. This action by the district court denied Appellants their right to a trial by jury. This action also denied the community's right to participate in the justice system by preventing a jury from considering admissible evidence regarding the negligent actions of a member of the community. As a public policy matter, the courts should not be determining the credibility of evidence prior to its consideration by a jury because such action denies the ability of the community, through a jury, to consider public safety issues including physician drug abuse and criminal activity. See, Miller v. Haller, 129 Idaho 345, 351, 924 P.2d 607, (1996) (*stating* that practicing medicine in Idaho is a privilege that is regulated, "to assure the public health of the citizenry").



The foundation of the civil and criminal justice systems is that credibility issues determined by the fact finder, not a court. To hold otherwise would be to prevent plaintiffs and victims of crime from having their case determined by a jury of their peers and further denies the community its role in the justice system by preventing juries from considering admissible evidence on the grounds that the court disbelieves the evidence. Therefore, Appellants respectfully request the district court's ruling on Dr. Wischmeyer's testimony be overturned, that the matter be remanded back to the district court for further review, and that the district court be instructed that it is to take Dr. Wischmeyer's opinions and the foundation for his opinions as true in considering whether the opinions are admissible expert testimony and are more probative than prejudicial.

## **VI. CONCLUSION**

Appellants respectfully request that this Court reverse the trial court's decision on Respondent's motion for summary judgment. The issue of agency is one of fact. Moreover, Respondent's independent negligence is also an issue of fact. There are material facts in dispute upon which reasonable minds can reach differing conclusions. Thus, summary judgment is inappropriate. The case should be remanded to the district court for further action consistent with this Court's opinion.


Additionally, Appellants respectfully request that this Court reverse the trial court's finding that Appellants' expert testimony is inadmissible. The district court applied an improper

standard when determining the admissibility of the evidence and, when determining whether the evidence was more probative than prejudicial.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of November, 2015.

THE MARKAM GROUP

JAMES, VERNON & WEEKS, P.A.

  
Mark Kamitomo  
Attorneys for Appellants

  
Lee James  
Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2 day of November, 2015, I caused to be served a true and correct copies of the APPELLANT'S OPENING BRIEF by the method indicated below, and addressed to the following:

J. Kevin West  
Parsons, Behle & Latimer  
800 W. Main Street, Suite 1300  
Boise, Idaho 83702

Markus W. Louvier  
Evans, Craven & Lackie, P.S.  
818 W. Riverside, Suite 250  
Spokane, WA 99201-0910

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Facsimile: (208) 562-4901
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Facsimile: (509) 455-3632

